TORONTO COMPUTER LEASING INQUIRY

and

TORONTO EXTERNAL CONTRACTS INQUIRY

The Honourable Denise Bellamy, Commissioner

Ruling

Regarding a Motion by Commission Counsel to Unseal & Inspect Boxes Containing Documents Belonging to Jeffrey Lyons

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Introduction & Conclusion

There are eighteen sealed banker's boxes that are currently stored safely in the Inquiry offices. They contain documents belonging to Jeffrey Lyons. They were discovered by the former law firm of Mr. Lyons in its storage facilities and the boxes arrived at the Inquiry pursuant to a valid summons signed by me. Mr. Lyons asserts that all the material in the boxes are irrelevant and protected by solicitor-client privilege. Should Commission Counsel be permitted to review the documents in confidence with Mr. Lyons or his lawyer to determine if there is anything in them that may be helpful to the Inquiries? That is the question for this ruling. I have decided the answer is yes.

As Commissioner of two Inquiries under section 274 of the *Municipal Act 2001,* S.O. 2001, c. 25, I have a duty toward everyone affected to be thoroughly fair. I must investigate and report in accordance with my Terms of Reference, but the investigation and public hearings must not only be fair but must also be perceived to be fair. Considerations of fairness have guided all my decisions to date. I have concluded that my lawyers, Commission Counsel, can confidentially review the material properly summoned because the review, as I will describe it below, is entirely fair to Mr. Lyons and anyone else affected by it.

How the Documents Were Summoned

The process by which Mr. Lyons' documents were summoned has an important bearing on the fairness of the confidential review of those documents.

Mr. Lyons is a lawyer. However, in recent years he has worked predominately as a lobbyist. He assists clients with their government relations, including relations with the City of Toronto. From December 1995 until June 2001 he conducted his lobbying work from the law firm of Morrison Brown Sosnovitch, where he was counsel. Mr. Lyons testified that he worked primarily as a lobbyist at this firm and when his lobbying clients required legal work, it was handled by other members of the law firm, not by him. His lobbying files were opened as Morrison Brown

Sosnovitch files when he worked there. Mr. Lyons' staff used the computers of Morrison Brown Sosnovitch which remained at the law firm after Mr. Lyons' departure.

MFP Financial Services Limited (MFP), Dell Financial Services Limited (DFS), and Dell Computer Corporation (Dell) were among Mr. Lyons' many clients. Both MFP and DFS bid on the City of Toronto 1999 computer leasing RFQ, which MFP won. When Mr. Lyons testified before this Inquiry in May 2003, he was insistent that he provided no legal services to MFP, DFS, or Dell. He claimed that he acted for them solely as a lobbyist. His lobbying work for these clients included work in connection with the City of Toronto. The activities of MFP, DFS and Dell during 1998-2001, as they relate to the City of Toronto, are part of the subject matter of these Inquiries.

Mr. Lyons was first served with a summons to the Toronto Computer Leasing Inquiry when he was interviewed by Commission Counsel in August 2002. Subsequently, he provided the Inquiry with some documents relating to MFP, but none for DFS. That was approximately fifteen months ago. He was served with a second summons in December 2002. Those summonses placed an obligation on him to make every reasonable effort to locate and provide in complete confidence (Rule 14 of the Rules of Procedure of the Inquiries), all documents within his custody, control or power "touching on the matters in question". His obligation in responding to the summonses included an obligation to obtain all potentially helpful material from Morrison Brown Sosnovitch, and provide it to Commission Counsel.

Mr. Lyons applied for and was granted standing at the Toronto Computer Leasing Inquiry (TCLI) on December 2, 2002. Under our Rules, people who are granted standing are deemed to undertake to follow the Rules of Procedure (Rule 9), which includes an obligation to produce to the Commission all documents having any bearing on the subject matter of the Inquiry (Rule 13).

Mr. Lyons' counsel corresponded and spoke extensively with Commission Counsel for months following the August 2002 interview and summons. On February 14, 2003, in one of many letters to Mr. Lyons' counsel, Commission Counsel said the following:

> Since my December 6 letter, several witnesses have given evidence, some of which involves your client; e.g. the evidence of Irene Payne … In light of that evidence, we would expect that you have enquired of Mr. Lyons' business entity (under which he practiced as a Lobbyist) and/or his former law firm (Morrison Brown Sosnovitch) seeking relevant documents.

By early March 2003, approximately six and a half months after Mr. Lyons was first summoned and three months after he obtained standing, Commission Counsel had received no assurance that either Mr. Lyons or his counsel had searched for material at Morrison Brown Sosnovitch that could be helpful to the judicial inquiry. The Toronto taxpayers who fund these Inquiries have a right to expect that the investigations and hearings will proceed not only fairly but also efficiently. When a summons is not responded to with appropriate dispatch, it is necessary that alternative investigative means be employed to prevent matters from slowing down unnecessarily. Accordingly, on March 7, 2003, Commission Counsel summoned directly from Morrison Brown Sosnovitch all "material relating to the matters in issue before this Inquiry". The summons was issued for both the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry and thus covered material helpful and relevant to both. At the hearing

of this motion, counsel for Mr. Lyons appropriately conceded that the summons to Morrison Brown Sosnovitch was properly issued.

Morrison Brown Sosnovitch co-operated fully and professionally with the March 2003 summons. Commission Counsel and the firm agreed that the summoned materials would be sealed. However, the firm's ability to respond to the summons was complicated by its discovery, after Mr. Lyons departed from the firm in June 2001, that some matters he worked on while at the firm, were not billed in accordance with the law firm's usual billing arrangements. Because the firm was not aware of this work, and because the work was not identified in accordance with the firm's usual administrative procedures, the firm had more difficulty locating records of this work. The firm's first search revealed nothing relevant.

The firm did continue its efforts and eventually, Morrison Brown Sosnovitch discovered a large amount of potentially helpful material in both electronic and paper form. Much of it was located in the firm's off-site storage facility. Unfortunately, due to the complication in the search arising from Mr. Lyons' billing practices, and because a letter from the firm dealing with electronic material went astray, Commission Counsel did not become aware that material had been located at Morrison Brown Sosnovitch until after Mr. Lyons completed his testimony at this Inquiry on May 14, 2003. Indeed, the search for Mr. Lyons' documents continued well after he testified at the hearings. Commission Counsel assisted Morrison Brown Sosnovitch in its search by giving the firm information that emerged during the evidence of both Mr. Lyons, and his assistant at the relevant time, Ms. Susan Cross.

With the benefit of hindsight, the contrast between Mr. Lyons' testimony and the later results of the search for material by Morrison Brown Sosnovitch is striking and troubling. Mr. Lyons testified that the DFS file was probably destroyed on his instructions. It was not. Morrison Brown Sosnovitch discovered the file, and sent it to Commission Counsel. Further, the firm has no record of any instruction by Mr. Lyons to destroy a file.

The DFS file was found in hard copy only after Mr. Lyons had given his evidence at the hearings. Commission Counsel examined that file and found two memoranda that have since figured prominently in the testimony of Mr. Jim Andrew, the former Executive Director of the Information and Technology Division at the City of Toronto. These memoranda were apparently prepared by Mr. Lyons, and relate to the 1999 City of Toronto leasing RFQ which is central to our Terms of Reference. The memoranda summarize conversations between Mr. Lyons and a confidential source apparently within the upper echelons of the Information and Technology Division at the City. Mr. Andrew has testified that the information contained in these memoranda should not have been communicated to Mr. Lyons. Some of it was confidential and the conversation summarized in one of the memoranda inappropriately took place during the RFQ "blackout" period of communication between bidders and the City. The source of this information has not yet been determined and, because the DFS file was not made available to Commission Counsel before Mr. Lyons' testimony, Mr. Lyons could not be asked under oath about the source of this material.

Mr. Lyons' statement that the DFS file was destroyed is unusual in a law firm environment where record retention is a matter of professional responsibility. The assertion is also contrary to the policy of Morrison Brown Sosnovitch, which the law firm described in a letter to Commission Counsel on July 21, 2003:

> The firm's policy on retention and storage of documents is the same today as was the policy during the time that Mr. Lyons was associated with our firm as counsel. The policy is that upon completion of the matter as determined by the lawyer in charge of the file the file is closed out, documents are returned to the client as appropriate and the file is then assigned a file away number and ultimately deposited in the firm's storage facility.

Mr. Lyons testified that he did not use long-term storage facilities because they are too expensive. However, when he left Morrison Brown Sosnovitch in 2001, he put twenty-one bankers boxes of files into the firm's long-term storage facilities. His DFS file was found in that location.

Mr. Lyons testified repeatedly that he searched for the DFS file, and that he asked his assistant Mr. Mangat to verify with Morrison Brown Sosnovitch whether there was electronic data. Morrison Brown Sosnovitch, however, wrote on July 21, 2003 that: "Mr. Lyons has not at any time to our knowledge requested from this firm any materials relevant to the Inquiries".

Mr. Lyons testified that his assistant, Mr. Mangat, learned from Morrison Brown Sosnovitch that electronic data had been "wiped clean" when he left the firm, "because they had too much data storage". This explanation is also quite unusual in a law firm environment, and contrary to Morrison Brown Sosnovitch's record retention policy. Most importantly, however, is that the firm's search did indeed reveal the existence of relevant electronic data.

Finally, in July 2003 Morrison Brown Sosnovitch advised Commission Counsel in a letter that "we did send two boxes of Mr. Lyons' personal files to Mr. Lyons at his request some time in the calendar year 2002". Mr. Lyons was therefore aware he had boxes in storage at Morrison Brown Sosnovitch. The Toronto Computer Leasing Inquiry was publicly announced in February 2002. Commission Counsel do not know what was in the boxes, nor do they know when in 2002 they were retrieved. Mr. Lyons has not volunteered this information.

The eighteen boxes of files in issue on this motion arrived at the Inquiry offices from Morrison Brown Sosnovitch on July 22, 2003. The law firm was appropriately attentive to possible issues of relevance and solicitor-client privilege. Sensitive to the firm's concerns, Commission Counsel suggested that in accordance with well-established legal procedure, they would receive the sealed boxes, and would not unseal them without either Mr. Lyons' consent, or an appropriate ruling from the Commissioner.

Beginning on August 6, 2003, Commission Counsel engaged in a lengthy exchange of correspondence with Mr. Lyons' counsel. No agreement on unsealing and reviewing the documents has been reached. The boxes remain sealed and this motion to unseal them was heard orally by me on Friday, October 10, 2003.

The Positions of Counsel on this Motion

Commission Counsel

Commission Counsel seeks a ruling that the eighteen boxes be unsealed confidentially by Commission Counsel and, if desired, in the presence of Mr. Lyons and/or his counsel, that the

contents of the boxes be reviewed for material relevant or helpful to these Inquiries, and that only potentially helpful material be examined for potential privilege issues.

Section 11 of the Ontario *Public Inquiries Act*, R.S.O. 1990 c. P.41 (as amended) makes clear that privileged materials are inadmissible at a judicial inquiry. There are three known outstanding lawsuits amongst the parties with standing. Clearly issues of solicitor-client privilege lurk in the background of these Inquiries. Accordingly, Commission Counsel has suggested the same process for the opening of these boxes as it has for summoned witnesses and for all the other parties with standing.

From the outset of their dealings with Morrison Brown Sosnovitch, Commission Counsel proposed that the documents received would be reviewed confidentially by them, in their capacity as *alter ego* for the Commissioner, in the presence of Mr. Lyons and/or his counsel. Unhelpful materials would be returned, and materials helpful to TCLI and TECI would be assessed for privilege. Unresolved privilege issues would be determined by the Regional Senior Justice or his designate.

This was the practice employed in the Walkerton Inquiry to address potential cabinet privilege in government documents. It has also been the practice to date in TCLI and TECI for all other documents that have raised potential privilege issues. In Walkerton and in these Inquiries, the process has worked efficiently and fairly: all privilege issues at the Walkerton Inquiry as well as TCLI and TECI have been resolved through Commission Counsel's confidential discussions with the affected parties. The issues are readily amenable to prompt and mutually satisfactory confidential resolution because both parties can address themselves to concrete issues that emerge from the particular contents of each document in issue.

Jeffrey Lyons

Mr. Lyons takes a very different position. Mr. Lyons asserts in a blanket way that all material received by Commission Counsel from Morrison Brown Sosnovitch is irrelevant and is protected by solicitor-client privilege. He further argues that relevance and privilege are, in essence, inextricably linked, and therefore cannot be separated by Commission Counsel in their review of the documents in question.

Mr. Lyons' position is that a summons under section 7 of the *Public Inquiries Act* mandates that the recipient of the summons (i.e. Morrison Brown Sosnovitch) produce relevant and admissible, but not privileged, documents. Mr. Lyons proposes that Morrison Brown Sosnovitch review the contents of the eighteen boxes for relevance and privilege. Morrison Brown Sosnovitch has declined. Alternatively, Mr. Lyons proposes that his lawyers review the documents privately, without the participation of Commission Counsel, to determine whether there is material in the boxes that may be helpful to me.

Mr. Lyons contends that Commission Counsel cannot view the documents. It is his view that Commission Counsel is a third party with a role not unlike that of a Crown attorney and, therefore, is not in any position to view potentially privileged material.

Dell Computer Corporation

Ms. Dyer on behalf of Dell Computer Corporation emphasized the importance of solicitor-client privilege, and the great care the law takes to protect it. She asserted that privileged documents are beyond the reach of the state, and that the state cannot view such documents without the prior informed consent of the affected client. The only people with a right of access to privileged documents are the client and its solicitor. No third parties have such access. She contends that commissioners and commission counsel are third parties, agents of the state exercising investigative powers granted by the Ontario *Municipal Act* and the *Public Inquiries Act*. Therefore, it is Ms. Dyer's position that neither I as Commissioner nor my Commission Counsel, are permitted to examine the documents over which privilege is claimed.

Both Mr. Lyons and Dell submit that the practical result of their positions is that counsel for the party claiming privilege should review the affected material alone.

City of Toronto

The City of Toronto supports the position taken by Commission Counsel, including the statement that Commission Counsel is the *alter ego* of the Commissioner. The City's position is informed by its direct experience in these Inquiries in resolving relevance and privilege issues confidentially with Commission Counsel in the manner described above. The City of Toronto stated it is satisfied that our process is fair, and expressed full confidence in Commission Counsel to review the material in an appropriate manner.

Mr. Roland for the City of Toronto opposes Mr. Lyons' claim that he alone should review the documents. Mr. Roland submits that Mr. Lyons, by his own failure to discharge his obligations pursuant to the summonses served in August and December 2002, has forfeited his opportunity to review the documents in advance. Mr. Roland submits that Mr. Lyons has not been candid in the production of documents, and argues that it would be difficult for Mr. Lyons, given such an unco-operative approach to date, to recast his thinking sufficiently to determine what is and is not helpful to this Inquiry. In short, difficult decisions about what is helpful should not reside with Mr. Lyons alone.

Analysis

Our Rules provide that the Commissioner may receive any evidence that she considers to be helpful in fulfilling the mandate of the Inquiry (Rule 21). Section 7 of the *Public Inquiries Act* grants a commission the power to summons a person to give evidence or produce documents relevant to the subject matter of the inquiry that are not inadmissible at the inquiry under section 11 (the privilege section).

The submissions of Mr. Lyons and Dell Computer that a commissioner and commission counsel cannot confidentially review privileged material are based on the criminal case of *Lavallee, Rackel & Heintz* v. *Canada* (2002), 167 C.C.C. (3d) 1 (S.C.C.). In this decision, the Supreme Court of Canada struck down the *Criminal Code* provisions governing law office searches, in part, because the sections gave the prosecution access to materials over which privilege was

claimed before there was a judicial determination that they were not privileged documents. Mr. Lyons and Dell argue by analogy from this criminal case that a commissioner and commission counsel are indistinguishable from prosecutors regarding access to privileged materials.

Our highest courts have repeatedly emphasized the central importance of solicitor-client privilege as a fundamental legal right. As the Supreme Court states in *Lavallee* (at paragraph 24):

> It is critical to emphasize here that all information protected by the solicitor-client privilege is out of reach for the state. It cannot be forcibly discovered or disclosed and it is inadmissible in court. It is the privilege of the client and the lawyer acts as gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore, any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice.

The simple fact remains, however, that regardless of how deeply valued any legal right may be, debates about its scope in particular factual circumstances will inevitably arise. That is why the Supreme Court in *Lavallee* held that in criminal investigations, a judge has the authority to review material over which a claim of privilege is made (paragraph 49). The rule is precisely the same in civil cases. Rule 30.10(3) of the Ontario Rules of Civil Procedure provides for a judge to review documents subject to a privilege claim to decide if they are in fact are privileged. A similar rule or practice exists in every civil jurisdiction in Canada. In short, the prohibition of involuntary third party access to solicitor-client materials has never been interpreted, nor should it be interpreted, to exclude review by a neutral arbiter of privilege disputes.

This brings us back to the judicial inquiry context. Does the assertion of a claim of solicitor-client privilege have the effect of preventing a commissioner and commission counsel access to the disputed documentation for any purpose? In my view, the answer to this question is no.

The Judicial Approach in a Public Inquiry

A commissioner and his or her commission counsel perform completely different functions from a prosecutor. There is no prosecutorial function in a judicial inquiry. I have mentioned this repeatedly throughout the course of these Inquiries. Our process is investigatory, not adversarial. It is a mandatory feature of the two Inquiries over which I preside, pursuant to section 274(1) of the *Municipal Act, 2001,* that the Commissioner be a Superior Court Judge. It is the commissioner and commission counsel who are therefore best placed to perform in an inquiry context the first instance neutral dispute resolution tasks that are undeniably central to the protection of solicitor-client privilege. Accordingly, the severance of a commissioner's powers as suggested by Mr. Lyons and Dell is unworkable for two basic reasons. First, it is not necessary to uphold solicitor-client privilege. Second, it would prevent judicial inquiries from discharging their important public functions.

The Supreme Court of Canada has explained that much of the value of judicial inquiries in Canadian society flows from the judicial approach they bring to pressing social problems. For example in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy*),

[1995] 2 S.C.R. 97, Mr. Justice Cory made the following observations that highlight the value of a judicial approach:

- "As *ad hoc* bodies, commissions of inquiry are free of many of the institutional impediments which at times constrain the operation of the various branches of government." (paragraph 60)

- "One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers." (paragraph 62)

- "Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence …" (paragraph 62)

The benefits of a judicial approach to important issues in the municipal sphere has likewise been noted by the Supreme Court in *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 (paragraph 26):

> A municipality, like senior levels of government, needs from time to time to get to the bottom of matters and events within its bailiwick. The power to authorize a judicial inquiry is an important safeguard of the public interest, and should not be diminished. …

If there is any lingering doubt from the foregoing quotations that a judicial approach to the task at hand is at the heart of a commissioner's responsibilities, the following statement from the Supreme Court, again in the *Consortium* case, dispels that doubt (paragraph 27):

> The fact a s.100 inquiry [now s.274 of the Ontario *Municipal Act, 2001*] is a judicial inquiry clearly seeks to balance the municipality's desire to have accurate information and useful recommendations from an independent commissioner against the right of private citizens and others to have their legitimate interests recognized and protected. A good deal of confidence is inevitably and properly placed in the ability of the Commissioner to ensure the fairness of the inquiry.

Commissioners in recent judicial inquiries have made clear that the success of their inquiries depends upon judicial attributes being brought to bear in a job where they are not formally sitting as judges. The Honourable Justice Dennis O'Connor wrote in his Report on the Walkerton tragedy that it was essential that an inquiry be perceived by the public as "independent and impartial" (*Report of the Walkerton Inquiry,* Part One, 2001 at p. 472).

The primary lesson in the Supreme Court authorities on the role of the commissioner, and in the perspectives of experienced Commissioners, is that a commissioner has investigative powers necessary to "get to the bottom of matters", but must exercise those powers, and conduct all other inquiry business, always in conformity with the role of judge. One can see that in a judicial inquiry, a commissioner has the responsibilities of a judge, transplanted into an inquiry context.

In civil or criminal litigation, it is accepted that permitting a judge to confidentially review material subject to a privilege dispute will not destroy or weaken the privilege. The Supreme Court has made it clear that judicial review of disputed material is an essential part of protecting the privilege in an orderly way. In a judicial inquiry, it is the commissioner who must always diligently discharge the judicial function. The Supreme Court directed in *Consortium*, in the passage from paragraph 27 cited above, that the commissioner must protect the rights of "private citizens and others to have their legitimate interests recognized and protected". Therefore, when a privilege dispute arises in a judicial inquiry, confidential review of the material by the commissioner is likewise an essential part of protecting the privilege in an orderly way.

Mr. Roland for the City of Toronto made the same point differently. The law is clear that third parties cannot see privileged materials. However in civil or criminal courts, no one objects to the examination by the judge of privileged material because the judge is not a third party in the relevant sense. The judge is the appropriate person to review privileged material because he or she must ensure that the case proceeds with due respect for everyone's rights. Likewise, in a judicial inquiry, the commissioner is not a third party. Like a judge, the commissioner must also ensure that the inquiry proceeds with due respect for everyone's rights. Accordingly, the commissioner in a judicial inquiry is precisely the appropriate person to review privileged material.

Counsel for Dell argues that a judicial inquiry exercises investigative powers granted by the *Public Inquiries Act*, and is therefore indistinguishable from the police and prosecution in a criminal case, at least with respect to access to privileged materials. While it is true that investigation is often a central component of a judicial inquiry's mandate, this argument overlooks a very basic and crucially important difference between criminal investigations and those undertaken by a judicial inquiry. It is the difference in focus.

Criminal investigations are focused exclusively on identifying a perpetrator for prosecution and punishment. Judicial inquiries are prohibited from focusing on prosecution and punishment. The law is clear that judicial inquiries have no power to impose criminal or civil liability, or even to pronounce upon it. Courts will readily shut down inquiries that look too much like criminal investigations (*Starr* v. *Houlden*, [1990] 1 S.C.R. 1366).

But what is it that makes criminal investigations and judicial inquiry investigations so very different? Police officers who identify perpetrators and build a case for successful prosecution and punishment face one inevitable reality: from the outset of the investigation, and every step of the way, they are in an adversarial relationship with the perpetrator.

In stark contrast, judicial inquiries have no adversarial relationship with anyone. As Mr. Justice Cory stated in the *Westray* decision quoted above, a judicial inquiry is free of the "institutional impediment", that is, an adversarial approach that "constrains" a police investigation. The value of a judicial inquiry lies precisely in a broad, distanced investigative approach, free of the adversarial or competitive pressures that people closer to the events might experience. For example, it is no accident that judicial inquiries often follow high profile miscarriages of criminal justice. The completely different investigative approach of a judicial inquiry is rightly perceived as a necessary antidote to a criminal investigation that went wrong.

Contrary to the position advocated by Dell, there is no necessary contradiction between being both an investigative body and a judicial body. There is a distinct advantage to judicially conducted investigations. The fact-finding investigation in a judicial inquiry is valued by the public precisely because it is conducted in a judicial way. This point was made by Mr. Justice Cory in the *Westray* case (paragraph 175):

> It is crucial that an inquiry both be and appear to be independent and impartial in order to satisfy the public desire to learn the truth. It is the commissioner who must be responsible for ensuring that the hearings are as public as possible, yet still maintain the essential rights of the individual witnesses.

In sum, the absence of an adversarial approach in a judicial inquiry ensures that an inquiry's investigative aspects differ markedly from criminal investigations. This absence of an adversarial approach, combined with the commissioner's judicial obligations as overseer, ensure that a commissioner and a judge are equally well placed to resolve privilege disputes that arise in their respective forums.

The Role of Commission Counsel

The role of commission counsel is not widely discussed in judicial decisions. However, there is a respectable body of legal literature on commission counsel's role. Experienced commissioners and commission counsel have over the years expressed an evolving but coherent conception of the role. The core principle is that commission counsel is the commissioner's *alter ego*; the agent of the commissioner.

Over time, inquiry mandates have become increasingly complex, involving intricate and wide ranging relationships among issues of fact, law, policy, institutional culture, and social practices. This increased complexity has generally increased the reliance of commissioners on counsel for the simple reason that where there is more to be done, and more help is needed to do it.

The increased complexity of inquiries, though, has not reduced the need for judicial comportment in everything an inquiry does. Therefore, as the role of commission counsel has expanded, the need for impartiality and judicial comportment by commission counsel has also expanded. The increased need for impartiality by commission counsel has edged the role along the spectrum from the helpful but independent barrister toward full-fledged membership in a judicial management team. For example, in the past decade, the prevailing view of the propriety of commission counsel participating in the writing of the final report has changed significantly. Compare for example, Mr. Justice John Sopinka, "The Role of Commission Counsel" *Commission of Inquiry*, Carswell: 1990, Ch. 5, edited by A. Paul Pross, Innis Christie & John A. Yogis at pp.84-85, disapproving of the practice, and Mr. Justice Dennis O'Connor, "The Role of Commission Counsel in a Public Inquiry" (2003), 22 *The Advocates Society Journal*, No. 1, p. 11 treating the opposite view as beyond dispute. See also Federal Court of Appeal decision, *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)* [1997] 2 F.C. 36 at para.102.

Impartiality on the part of commission counsel is not to be confused with a lack of rigour and vigilance in seeking the truth. Commission counsel must still act forcefully wherever necessary

to overcome resistance that could obscure truth. This persistence is particularly important wherever the transparency of public inquiries motivates resistance on the part of those with something to hide. What makes commission counsel's role unique is that they must take into consideration the public interest, the interests of all parties, and furthermore, must explore conscientiously all plausible explanations and outcomes regardless of whose interests are advanced.

We have now reached a point in the evolution of commission counsel's role where it can be confidently asserted that every task they undertake must be infused with an impartiality inseparable in degree from that of the commissioner. Accordingly, there is no basis to distinguish in principle between a commissioner and commission counsel for purposes of confidentially reviewing potentially helpful or privileged material. I am supported in this conclusion by the approach taken in the Walkerton Inquiry. In Walkerton, confidential review of potentially privileged materials by commission counsel took place to the satisfaction of everyone who participated regardless of their interest in the materials (See the *Report of the Walkerton Inquiry*, Part One, pp.486-87 and Appendix H(III) pp.131-137).

Turning from principle to the facts before me, no one has alleged that Commission Counsel's conduct in these Inquiries has disentitled them from assisting me with a confidential review of potentially privileged materials. Indeed, the only comments on the conduct of Commission Counsel was from the City of Toronto. The City of Toronto assured me that Commission Counsel to date have conducted themselves in a completely satisfactorily manner during the confidential privilege reviews affecting the City in these Inquiries. The City said it has full confidence in Commission Counsel to conduct similar reviews in the forthcoming months of the Inquiries. Accordingly, I see no basis in either principle or fact to distinguish between myself as Commissioner and my Commission Counsel for purposes of confidentially reviewing potentially privileged material.

In a judicial inquiry such as this, a commissioner is bound to discharge his or her functions judicially. It stands to reason that so too do the commissioner's counsel who act as the commissioner's *alter ego*, in fulfilling their responsibilities to the commissioner.

Practical Considerations: Making Inquiries Work

For the reasons set out below, the practice of having commission counsel confidentially review potentially helpful and/or privileged documents is the most practical way of resolving relevance and privilege disputes fairly, while at the same time ensuring that inquiries are on track and on budget. While the practical considerations that follow are significant, they are secondary in nature and would have to give way, if it were not otherwise completely fair and in keeping with the importance of solicitor-client privilege for a commissioner and commission counsel to review relevant and/or privileged material in confidence.

The first and most important practical consideration is the close relationship between relevance, or helpfulness, and privilege. It makes no sense to address privilege issues on irrelevant or unhelpful materials. If a particular document received in response to a summons is not something Commission Counsel wishes to place before the Inquiry, no effort need be expended discussing and resolving questions of privilege. Thus, relevance or helpfulness assessments precede

privilege issues. Examining the documents first for relevance or helpfulness increases efficiency by eliminating unnecessary discussions about privilege. But this does mean that anyone reviewing the documents for relevance or helpfulness may see documents that might, if they are helpful to the commission, spawn a privilege claim. Practically speaking, if commission counsel cannot see privileged material, they cannot do a central part of their job: they cannot decide what is helpful to the commissioner.

No one is better placed to assess relevance or helpfulness than commission counsel. They have a continuous and central presence at all inquiry hearings. By contrast, counsel for a party may attend hearings sporadically, if at all. In the Toronto Computer Leasing Inquiry, for example, counsel for Mr. Lyons has attended fewer than twenty of the over one hundred and twenty-five hearing days to date, quite understandably attending on days that directly involved Mr. Lyons' interests, but which dealt with only a narrow sub-set of Inquiry issues. Mr. Lyons is a summoned witness for the second Inquiry. Commission Counsel are simply better placed to assess relevance than the parties. Further, Commission Counsel are best placed to assess helpfulness. Documents relevant to the Terms of Reference may not be helpful because the Inquiry has acquired a narrower focus, or because the matters covered in the document can be fully addressed with materials from other sources. These important insights would not necessarily be apparent to someone who is not fully immersed in the Inquiries.

Conversely, if someone other than Commission Counsel needed to assess documents for relevance first and then privilege, it would be necessary for that other party to be fully briefed on the Inquiry issues. This would entail much needless additional effort and could require Commission Counsel to be in breach of our own Rules (see below). In any event, even with the effort expended, the information transfer could never be perfect. The result would be that the relevance and privilege review conducted by the outside party would suffer in quality. This in turn would affect the quality of the public hearings and fulfilment of the terms of reference.

In the *Consortium* case, the Supreme Court described an inquiry as a relatively unstructured "giant multi-party examination for discovery", moving "in a convoy carrying participants of widely different interests, motives, information, involvement and exposure"(paragraph 41). This description aptly captures the present Inquiries. The inevitable result of such a work-in-progress is that relevance and helpfulness are fluid concepts, changing shape with the ebb and flow of evidence and investigation. In this context, it is simply wrong to think that an outside party could be adequately briefed at one point in time to assess relevance and helpfulness for the duration of the Inquiries. Several briefings over time would no doubt be required, thus multiplying the opportunities for imperfect knowledge transfer and consequent error in assessing relevance and helpfulness.

At the same time as the public hearings are taking place, Commission Counsel outside the hearing room are conducting investigations. These investigations are necessarily confidential and cannot be shared beyond Commission staff (see, for example, Rule 14 of our Rules of Procedure). However, these confidential investigations may have a substantial bearing on what is relevant and/or helpful. Accordingly, it is impossible for anyone but Commission Counsel, who are privy to the results of confidential investigations, to comprehensively appreciate what is relevant and helpful.

A commissioner and his or her counsel, working together, are the only persons placed to make fair-minded strategic decisions on how to conduct an inquiry. Accordingly, commission counsel reporting to the commissioner are best placed to minimize privilege disputes because they have the decision-making authority to adjust the flow of evidence where it would eliminate or avoid a privilege issue, and would otherwise well serve the Inquiry's purposes.

The foregoing practicalities all converge into one basic policy issue. Since privilege and relevance/helpfulness are so tightly intertwined, all of them must be addressed, at least initially, by the same decision maker. Who should that be for a judicial inquiry? The commissioner, with the assistance of commission counsel. Control of a public inquiry should be in the hands of the person presiding. If the commissioner has no control over relevance, he or she has little control of the judicial inquiry. The Supreme Court in *Consortium* has recognized that it is a "tall order to orchestrate" the processes of a public inquiry (paragraph 41). The task would be virtually unmanageable in many instances if control over something as basic as relevance were taken away.

Turning to the evidence before me, the blanket claim of irrelevance and privilege argued by Mr. Lyons' counsel, who conceded he had not seen any of the documents covered by the claim, is unlikely to lead to substantial privilege issues . The privilege claim is diametrically opposed to Mr. Lyons' sworn evidence that he acted solely as a lobbyist for those of his clients involved in these Inquiries.

Again on the facts before me, Mr. Lyons' conduct in responding to the summonses could be seen by some as unco-operative with these Inquiries. That is the City of Toronto's position. I am not, at present, prepared to make a finding on that issue. The evidence regarding the two boxes Mr. Lyons apparently removed from Morrison Brown Sosnovitch in 2002 is incomplete. Observers could conclude that Mr. Lyons has been unco-operative, at least at this stage. Mr. Lyons was unresponsive to Commission Counsel's request that he make inquiries of Morrison Brown Sosnovitch. He has not discharged his undertaking as a party under our Rule 13 to produce all documents having any bearing on the Inquiry. He has not discharged his obligation under the summonses to locate and produce documents about his participation in the leasing RFQ. Therefore, the perception of these Inquiries by reasonable observers could be adversely affected if Mr. Lyons and his counsel were now entrusted as the sole arbiters of what is relevant, helpful and privileged in the eighteen sealed boxes in the Inquiry offices.

On the facts before me, Commission Counsel was right to seek the Lyons material directly from Morrison Brown Sosnovitch. The opportunity for Mr. Lyons to review the documents himself lapsed months ago. The progress to date of the hearings and the continuing investigation in the Toronto Computer Leasing Inquiry and the investigation in the Toronto External Contracts Inquiry means that Commission Counsel is now in a better position than Mr. Lyons or his lawyers to conduct this review. On the other hand, Mr. Lyons is in fairness entitled to participate in an expeditious review. The boxes are now on site, and Commission Counsel are fully capable of reviewing them in confidence with Mr. Lyons' counsel. Considerations of simple convenience dictate that they should be reviewed in accordance with the routine practice that has been followed invariably when summonsed material arrives at Inquiry premises.

The final practical point to be made is that my confidential meetings with Commission Counsel outside the hearing room are frequent and informal. Accordingly, I can much more readily

monitor the confidential review of documents than would be the case if it were done by an outside party.

Conclusion and Ruling

I have concluded that it is fundamentally fair to Mr. Lyons and his clients that the eighteen sealed boxes now on Inquiry premises be reviewed at this site in confidence in the presence of Mr. Lyons and/or his counsel if he so chooses. I have concluded that such a review will preserve the sanctity of solicitor-client privilege and is also in the best interests of these Inquiries.

My formal ruling is set out below. In paragraph 9 of that ruling, I have followed the Walkerton precedent and decided that privilege disputes will be resolved by the Regional Senior Justice or his designate, not by me. I do so not because I have any doubt about the propriety of deciding those issues myself. For the reasons set out at length above, I believe that it would be entirely fair for me to decide privilege issues. Judges routinely disabuse their minds of evidence they have considered and ruled inadmissible, and a privilege hearing conducted by me would involve nothing more difficult than that. However at the outset of these Inquiries, I chose to follow the precedent that had worked well in the Walkerton Inquiry and Commission Counsel have consistently offered this avenue of review to parties in these Inquiries. I am grateful to Regional Senior Justice Blair for his commitment.

1. Commission Counsel will unseal all eighteen boxes received at the Inquiry premises from Morrison Brown Sosnovitch and review their entire contents for relevance, helpfulness and possible privilege, taking into account all issues in both the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry.

2. The review will be conducted confidentially on Inquiry premises. It will begin immediately after the expiry of five full working days following the date of the release of this Ruling, and continue during business hours on consecutive working days until completed.

3. Mr. Lyons and/or his counsel, including counsel's student-at-law, may attend and participate in the review within the time frame set out above.

4. If documents relating to Dell Computer Corporation are discovered, Dell may participate in the review within the time frame set out above.

5. Unhelpful material and privileged material will be returned as soon as practicable.

6. Helpful and non-privileged material will be distributed to parties with standing in the usual manner employed by these Inquiries.

7. Helpfulness and privilege issues will be resolved between counsel wherever possible.

8. Materials that are the subject of unresolved helpfulness claims will be placed before me for a ruling. Affected parties may make submissions as I direct.

9. Materials that are the subject of unresolved privilege claims will be placed before the Regional Senior Justice for the Toronto Region, or his designate, for a ruling. Notice of any

hearing before the Regional Senior Justice or his designate will be provided to all parties with standing in both Inquiries. It will be for that judge to decide whether intervenor status will be given and whether the hearing will be *in camera* or in public. Claims for privilege must be accompanied by: a description of the document including the date, type and parties to whom it pertains; a description sufficient to identify the contents without compromising the alleged privilege; and the reason for the privilege claim. Affected parties may make submissions as the Regional Senior Justice or his designate may direct. Without necessarily agreeing that there will not be material facts in disputes, parties are agreed that a proceeding before the Regional Senior Justice or his designate is deemed to be an application pursuant to Rule 14 of the *Rules of Civil Procedure*.

10. If a notice seeking review of this ruling in any appropriate court is properly served and filed before the eighteen sealed boxes are unsealed in accordance with paragraph 2 above, then the boxes shall remain sealed and stored on Inquiry premises. The sealed boxes shall then be dealt with only as directed by either the reviewing court, or by me as authorized by the reviewing court.

Commission Counsel:	Mr. David Butt and Mr. Christopher Thiesenhausen
Counsel for Jeffrey Lyons:	Mr. Richard Auger
Counsel for the City of Toronto:	Mr. Ian Roland and Mr. Andrew Lewis
Counsel for Dell Computer Corporation:	Ms. Valerie Dyer

Motion heard:	Friday, October 10, 2003
Ruling released:	Wednesday, October 15, 2003